Nos. 21-463 & 21-588

In The Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,
Petitioners,
v.

AUSTIN REEVE JACKSON, ET AL.,
Respondents.

UNITED STATES,
Petitioner,
v.

STATE OF TEXAS, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g., June Medical Servs. v. Russo*, 140 S. Ct. 2103 (2020). The ACLJ is committed to the constitutional principle of federalism that is threatened by Petitioners' insistence that constitutional limits on federal jurisdiction must give way when unfettered access to abortion is at stake.

SUMMARY OF THE ARGUMENT

It is indefensible to bring a federal case to stop private citizens from suing each other in state court. Yet Petitioners ask this Court to expand the ever growing list of legal rules cast aside to preserve abortion's favored status. Long established limits on federal court subject matter jurisdiction foreclose Petitioners' claims. Federal courts do not have jurisdiction to hear pre-enforcement challenges to state laws that are enforceable only by private parties. They certainly do not have the power to

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

enjoin state court judges from deciding private civil remedy lawsuits authorized by state law. Petitioners' insistence that federal courts should enjoy such expansive powers when abortion is at stake turns principles of federalism and comity on their head.

Contrary to Petitioners' fears, adherence in this case to Article III and Eleventh Amendment limits on federal subject matter jurisdiction does not pose an existential threat to constitutional rights. State courts are fully competent to adjudicate constitutional claims arising in state civil remedy lawsuits. This Court has emphatically resisted the contention that state court judges are less capable than federal judges of enforcing the Constitution of the United States. Several varieties of tort law claims entail resolution of constitutional issues by state courts. Petitioners' proposed deviation from the rules of federal subject matter jurisdiction risks a greater parade of horribles: a right to sue in federal court to preclude a suit in state court over any tort that might, in its application, infringe upon constitutional rights.

ARGUMENT

Federal courts do not have jurisdiction to hear pre-enforcement challenges to state laws that are enforceable only by private parties. *Whole Women's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021). Nor do they have the power to enjoin state court judges from deciding private lawsuits brought under the Texas Heartbeat Bill, also known as SB 8. *See Muskrat v. United States*, 219 U.S. 346, 361–62 (1911) (Article III does not permit the federal judiciary to determine the constitutionality of a statute enforced

through private causes of action in a suit brought against government officials); *Ex parte Young*, 209 U.S. 123, 163 (1908) ("[T]he right to enjoin an individual, even though a state official, from commencing suits . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature."). Petitioners' insistence that Article III limits on federal jurisdiction be stretched to permit their pre-enforcement challenge in this case should be rejected for what it is: further metastasis of "abortion distortion." *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting) ("This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence."); *id.* (noting that it is "painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion"); *see also Stenberg v. Carhart*, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting) (noting this Court's tendency "to bend the rules when any effort to limit abortion . . . is at issue"); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2153 (2020) (Alito, J., dissenting) (The "right" to abortion has been used "like a bulldozer to flatten" other legal rules that "stand in the way.").

Only in abortion cases is First Amendment protection for "[u]ninhibited, robust, and wide open" debate subordinated to an "unheard-of 'right to be let alone' on the public streets." *Hill v. Colorado*, 530 U.S. 703, 764–65 (2000) (Scalia, J., dissenting). And only in abortion cases are restrictions on third-party

standing abdicated. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2331–32 (2016) (Alito, J., dissenting). Creating an abortion exception to constitutional limits on federal subject matter jurisdiction would be a frontal assault on a core feature of federalism: comity between federal and state judicial courts. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975). This Court should reject Petitioners' attempt to repudiate this core jurisdictional principle.

I. Federal Courts Lack Jurisdiction to Hear Pre-Enforcement Challenges to Privately Enforceable Laws.

Claims against state officials for injury arising out of a civil remedies law are not justiciable. Petitioners insist that there just *has* to be a federal court remedy, *preenforcement*, to preclude private civil claims where such claims may be inconsistent with federal constitutional rights. Not so.

Federal subject matter jurisdiction has always been limited. Indeed, federal courts did not have federal question jurisdiction until 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (providing federal courts with jurisdiction for claims "arising under federal law"). In modern times, federal court jurisdiction is cabined in multiple ways by Eleventh Amendment immunity, the well-pleaded complaint rule, the Court's abstention doctrines, and Article III's limits on justiciability. All of these limits preclude potentially valid federal constitutional claims from being heard in federal court. Several such doctrines bar the claim here.

A. Eleventh Amendment Immunity

The Eleventh Amendment bars Whole Woman's Health's suit. The Eleventh Amendment limits federal court jurisdiction by barring states from being sued without their consent in federal court, both by persons from another state and by citizens of their own state. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The only exception is for suits seeking prospective relief against state officers sued in their official capacity. *Ex parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* exception is limited to government officials who "have some connection with the enforcement of the act." *Id*. at 156–57.

In so holding, the *Ex parte Young* Court distinguished its earlier ruling in *Fitts v. McGhee*, 172 U.S. 516 (1899). *Fitts* involved a suit against the Governor and Attorney General of Alabama challenging a state law imposing maximum rates chargeable on a state bridge. *Id*. at 516. The Court held that the suit against defendants violated the Eleventh Amendment because the Governor and Attorney General did not "h[o]ld any special relation to the particular statute alleged to be unconstitutional." *Id*. at 530.

> There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, *and a suit against officers of a state merely to test the constitutionality of a state*

> *statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state.*

Id. at 529 (emphasis added).

Applying *Fitts*, federal circuit courts have unanimously held that *Ex parte Young* does not apply where the government officials named as defendants have no authority to enforce the challenged statute. *See, e.g.*, *Children's Healthcare is a Legal Duty v. Deters*, 92 F.3d 1412, 1416–17 (6th Cir. 1996) (refusing to apply *Ex parte Young* to action against Attorney General where only local prosecutors had authority to enforce the challenged statute); *1st Westco Corp. v. Sch. Dist.*, 6 F.3d 108, 113–16 (3d Cir. 1993) (affirming dismissal of school district's third-party complaint because it was the school district, and not the state officials, who enforced the provision); *Harris v. Bailey*, 675 F.2d 614, 616–17 (4th Cir. 1982) (dismissing Attorney General in challenge to state garnishment proceedings because he had "no state constitutional or statutory obligation to defend a party, intervene in the action, or administer the procedure in question").

Similarly, where the challenged state law is enforceable only through private civil action, and state officials have no enforcement power, lower courts agree that the state's Eleventh Amendment immunity prevails. *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341–41 (11th Cir. 1999) (holding that the *Ex parte Young* doctrine did not apply to civil enforcement provision of Alabama's partial-birth abortion statute); *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (plurality of en banc court

concluding that Governor and Attorney General of Louisiana were immune from suit under the Eleventh Amendment because they did not enforce the law); *Hope Clinic v. Ryan,* 195 F.3d 857, 875 (7th Cir.1999), *vacated on other grounds by* 530 U.S. 1271 (2000) (upholding a partial-birth abortion civil-liability provision that was "enforced in private litigation; the states' Attorneys General and local prosecutors have nothing to do with civil suits.").

The "some connection" requirement in *Ex parte Young* is consonant with Article III justiciability requirements, particularly those related to standing. A state official who has no enforcement authority has no power to cause injury that can be redressed in federal court.

B. Article III's Justiciability Requirements

Article III's justiciability requirements bar all of the Petitioners' claims because Petitioners lack standing. Litigants must prove three things to establish standing: (1) they suffered an actual injury, (2) there is a "causal connection between the injury and the conduct complained of" that can be traced back to the defendant's actions, and (3) the injury is likely to be redressed if the court rules in the plaintiff's favor. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Therefore, even if an actual injury occurs, the plaintiff must establish causation and redressability in the particular case. *Id*. The causation prong requires that the injury "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky.*

Welfare Rts. Org., 426 U.S. 26, 41–42 (1976). Redressability requires that "the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power." *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring) (emphasis omitted).

Petitioners cannot satisfy the causation and redressability prongs because none of the state actor defendants they have sued has authority to enforce the law. An injunction prohibiting the Texas government officials from enforcing the private-suit provisions "would be pointless; an injunction prohibiting *the world* from filing private suits would be a flagrant violation of both Article III and the due process clause (for putative private plaintiffs are entitled to be notified and heard before courts adjudicate their entitlements)." *Hope Clinic v. Ryan*, 249 F.3d 603, 605–06) (7th Cir. 2001) (per curiam) (en banc).

On this point, the circuit courts of appeal are unanimous. *See, e.g.*, *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005) (holding in challenge to private civil remedies law, that there was no causal connection between defendant state officials and plaintiff abortion clinic's loss of minor patients unable to obtain parental consent); *Okpalobi*, 244 F.3d at 426 (holding that, under the specific statute at issue, no actions by "the defendant state officials has caused, will cause, or could possibly cause any injury to Plaintiffs"); *1st Westco Corp.*, 6 F.3d at 115 (holding there was no case or controversy before the district court because the named defendants lacked authority to enforce the law); *Digit. Recognition Network, Inc. v.*

Hutchinson, 803 F.3d 952 (8th Cir. 2015) (holding that plaintiffs failed to satisfy causation and redressability elements because named defendants had no authority to enforce the law).

C. Abstention Doctrines

Petitioners' claim that federal courts have the power to enjoin state court judges from deciding SB 8 lawsuits eviscerates the animating principles of this Court's abstention doctrines. Abstention is driven by the notion of *comity* – "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

Comity reflects the profound commitment to "Our Federalism," which requires "sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, *anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States*." *Id*. at 45 (emphasis added).

For that reason, the Court has "repeatedly and emphatically rejected the postulate" that state courts are not fully competent to adjudicate federal constitutional claims. *Moore v. Sims*, 442 U.S. 415, 437 (1979); *Huffman*, 420 U.S. at 604 (noting that federal interference in state court judicial proceedings

"can readily be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles").

Enjoining Texas state courts from deciding cases under SB 8 is unbridled interference with "Our Federalism" and "a violation of the whole scheme of our Government." *Ex parte Young*, 209 U.S. at 163.

II. Petitioners' Parade of Horribles Is Overblown and Far Outweighed by the Damage to Federal Subject Matter Jurisdiction that Would Result from a Decision in Petitioners' Favor.

Petitioners raise a parade of horribles about what will happen if this Court does not create an abortion exception to federal jurisdictional limits. Petitioners fear that the Bill of Rights will be a dead letter if pre-enforcement challenges to privately enforced state laws are not permitted in federal court. [2]

But what Petitioners overlook is that privately enforceable state laws burdening federal rights are remarkably common. More importantly, the state judiciary is perfectly capable of faithfully upholding constitutional rights. *See Zwickler v. Koota*, 389 U.S. 241, 245 (1967) (noting that during most of the nation's first century, constitutional rights were enforced in state courts).

Many varieties of tort law claims entail resolution of constitutional issues by state courts, particularly First Amendment rights. If Petitioners' proposed expansion of federal subject matter jurisdiction is

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[2] Whole Woman's Health Pet. 27.

accepted, a much longer parade of horribles will be ready to march in the opposite direction: a right to sue in federal court to preclude a suit in state court over any tort that might, in its application, infringe upon constitutional rights:

Defamation - *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974) (upholding First Amendment defense in defamation suit);

Tortious interference with contract - *City of Keene v. Cleaveland*, 118 A.3d 253, 261 (N.H. 2015) (affirming trial court's dismissal of tortious interference, civil conspiracy, and negligence charges, and holding that "enforcing the City's tortious interference with contractual relations claim would violate the respondents' First Amendment rights");

Trespass - *Reddy v. Plain Dealer Publ'g Co.*, 991 N.E.2d 1158 (Ohio Ct. App. 2013) (holding that a newspaper publisher had a First Amendment right to deposit its publication on a residence without permission of the homeowner);

Intentional Infliction of Emotional Distress - *Snyder v. Phelps*, 562 U.S. 443 (2011) (First Amendment barred state tort claims for IIED); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (same);

Invasion of Privacy - *Gates v. Discovery Commc'ns, Inc.*, 101 P.3d 552, 562 (Cal. 2004) (holding that an invasion of privacy claim was improper under the First Amendment when a corporation had published facts obtained from official records); *Battaglieri v. Mackinac Ctr. for Pub. Pol'y,* 680 N.W.2d 915, 919–20 (Mich. Ct. App. 2004) (holding that a fundraising letter quoting the president of a Teachers union was privileged under the First

Amendment and liability for invasion of privacy was barred); *Goodrich v. Waterbury Republican-Am., Inc.*, 448 A.2d 1317, 1326–27 (Conn. 1982) (holding that expressions of opinion in newspaper articles was constitutionally protected by the First Amendment from an invasion of privacy claim).

The fact of the matter is that if a claim rests on a "blatantly unconstitutional" law, state courts will have little trouble dispatching the suit quickly and easily. This Court should not distort federal subject matter jurisdiction to get to that same endpoint.

CONCLUSION

This Court should affirm the judgments of the Fifth Circuit and remand with instructions to dismiss the lawsuits for lack of justiciability.

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